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NO. 86-1210

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1986

HARLLEL B. JONES,

Petitioner,

-vs-

ROBERT SHANKLAND, ET AL.,

Respondents

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF OF SHANKLAND AND FUERST IN OPPOSITION

MARILYN G. ZACK, ESQ.
Director of Law

ROBERT M. WOLFF, ESQ.
Assistant Director of Law
(Counsel of Record)

City of Cleveland
City Hall - Room 106
601 Lakeside Avenue
Cleveland, Ohio 44114
(216) 664-2673

COUNSEL FOR RESPONDENTS
SHANKLAND AND FUERST

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Circuit Court correctly followed the mandate of Wilson v. Garcia 471 U.S. 261 (1985) in choosing Ohio's intentional tort statute of limitation as the appropriate statute in 42 U.S.C. § 1983 actions, where Ohio has two statutes of limitation governing tort actions for injury to persons.

2. Whether the Circuit Court was correct in ruling that petitioner's cause of action, which alleged malicious prosecution and unconstitutional conviction, accrued no later than the date of this Court's denial of the State's petition for writ of certiorari following appeal from a final judgment granting a writ of habeus corpus.

3. Whether petitioner is entitled to a federal equitable rule, tolling operation of the statute of limitations during the period petitioner was under the restriction of bail absent any showing that the state law, limiting the disability of "imprisonment" to actual confinement, is inconsistant with the Constitution and laws of the United States.

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STATEMENT OF THE CASE

The procedural genesis of this lawsuit commenced on March 28, 1972, when petitioner, Harllel Jones (hereinafter "petitioner" or "Jones") was convicted in

the Cuyahoga County Court of Common Pleas of second degree murder and shooting with intent to kill or wound. Jones was sentenced to an indeterminate life sentence and a concurrent sentence of one to twenty years. See Jones v. Jago, 428 F. Supp. 405, 406 (N.D. Ohio 1977), aff, Jones v. Jago, 575 F. 2d 1164 (6th Cir. 1978), cert. denied Jones v. Jago, 439 U.S. 883 (1978).

While incarcerated, Jones filed a petition in state court to vacate his judgment; See, State ex rel Jones v. Court of Common Pleas, 55 Ohio St. 2d 130 (1978) where Jones petitioned for a writ of mandamus to compel the common pleas court to act in connection with his motion to vacate. Jones also filed a petition for writ of habeus corpus in federal district

court which was granted on February 10, 1977. In a memorandum opinion and (self-executing) order, dated February 10, 1977, the court ruled that:

> . . .the writ shall issue and the petitioner shall be released unless within 90 days of this order the state begins new trial proceedings against him.
>
> Jones v. Jago, supra, 428 F. Supp. at 411.

Jones was released from custody on June 24, 1977 pursuant to the District Court's order. See, Jago v. U.S. District Court, 570 F. 2d 618, 619 n. 1 (6th Cir. 1978).

In Jago v. U.S. District Court, supra, the State unsuccessfully petitioned the Sixth Circuit to compel the withdrawal of the grant of bail to Jones by the District Court. The Appellate Court

overruled the petition, stating:

> The petitioner is possessed of a final judgment that his trial did not meet constitutional standards of fairness and is by now entitled, to release on bail. . .
>
> 570 F. 2d at 619 (1978) (Emphasis supplied.)

On May 3, 1978, in Jones v. Jago, 575 F. 2d 1164 (Sixth Cir. 1978), the order granting the habeas writ was affirmed. The State's petition to the Supreme Court for a writ of certiorari was denied on October 2, 1978. Jago v. Jones, 439 U.S. 883 (1978).

On October 29, 1979, nearly thirteen months after the denial of certiorari, twenty-eight months after he was released on bail and thirty-two months after the district court granted the writ, plaintiff filed the instant lawsuit

against three Cleveland Police Officers (Shankland, Mahon[1] and Fuerst), two FBI agents, Robert Perry (Jones' co-defendant at the criminal trial) several county prosecutors and Cuyahoga County. In this Complaint, Jones alleged violation of constitutional rights allegedly cognizable under 42 U.S.C. § § 1983, 1985 and 1986, as well as pendant State claims of false imprisonment, malicious prosecution, abuse of process and defamation.

In an order dated July 2, 1984, the District Court dismissed the case as to all defendants. Judge Battisti ruled that Jones failed to file this § 1983 action within the one (1) year statute of

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1. Police Officer Mahon was never served.

limitations contained in § 2305.11 of the Ohio Revised Code. The Sixth Circuit Court of Appeals affirmed in an order issued September 2, 1986. See Jones v. Shankland, 800 F. 2d 77 (6th Cir. 1986). Jones' Petition For Rehearing En Banc was denied on October 20, 1986.

REASONS FOR DENYING THE WRIT

I. THE SIXTH CIRCUIT'S DETERMINATION THAT OHIO'S ONE YEAR INTENTIONAL TORT STATUTE OF LIMITATIONS IS THE MOST APPROPRIATE FOR USE IN SECTION 1983 ACTIONS IS ENTIRELY CONSISTENT WITH THIS COURT'S HOLDING IN WILSON V. GARCIA.

Petitioner urges this Court to grant a writ of certiorari to resolve an alleged conflict among and within the circuits regarding selection of the most appropriate statute of limitations in § 1983 actions. However, petitioner's argument supports neither the language or rationale underlying this Court's decision in Wilson v. Garcia, 471 U.S. 261 (1985). In Wilson, this Court determined that just one statute of limitations should be applied for all § 1983 actions in each

state. According to this Court, "uniformity within each State is entirely consistent with the borrowing principle contained in § 1988" 471 U.S. at 275. (Emphasis supplied).

Petitioner voices concern about a lack of unanimity among the circuits as to which statute of limitations to apply in § 1983 actions. Indeed, Jones points to an alleged conflict within the Sixth Circuit between Mulligan v. Hazard, 777 F. 2d 340 (6th Cir. 1985), cert. denied ___ U.S. ___ 106 S. Ct. 2902 (1986), where the court applied Ohio's one year intentional tort statute of limitations (Ohio Revised Code § 2305.11) and Carroll v. Wilkerson, 782 F. 2d 44 (6th Cir. 1986) cert. denied sub nom County of Wayne v. Carroll, ___

U.S. ___, 107 S. Ct. 330 (1986) where the court applied Michigan's three year statute of limitations govering personal injury claims (MCLA § 600.5805(8)).

These decisions simply do not conflict with the mandate of Wilson, where this Court determined the single best characterization for all § 1983 actions to be as "claims for personal injury" 471 U.S. at 279. Given this determination of the nature of § 1983 actions, this Court, in Wilson, selected New Mexico's three (3) year Statute of Limitations governing tort actions "for an injury to the person or reputation of any person." (N.M. Stat Ann. § 37-1-8 (1978)) as the most appropriate limitation period.

The Sixth Circuit, in Carroll v.

Wilkerson, supra, likewise had before it a Michigan statute of limitation for "personal injury" to select as the most appropriate statute under Wilson. Thus, the Sixth Circuit held, in Carroll, that the "Section 1983 action was subject to the [Michigan] three year statute of limitations for personal injury claims. . ." 782 F. 2d at 45.

However, in Mulligan v. Hazard, supra, the Appellate Court had no one statute of limitations governing injuries to person. Instead, Ohio had "two [tort] statutes of limitations relating to personal injury actions, Ohio Rev. Code § 2305.10 [for bodily injury and damage to property] and 2305.11 [governing intentional torts] 777 F. 2d at 344.

After a review of this Court's discussion in Wilson of the legislative history of the Civil Rights Act of 1871, the Mulligan Court decided that § 2305.11 of the Ohio Revised Code,

> . . . which applies to actions involving assaults, batteries and the like, more specifically encompasses the sorts of actions which concerned Congress as it enacted the Civil Rights Sttutes.
>
> 777 F. 2d at 344.

The fact that different statutes of limitation have been selected by the federal courts for the different states in no way violates the language or policy of Wilson. Indeed, in borrowing the most appropriate state statute of limitations, the "federal law incorporates the state's

judgment on the proper balance between the policies of repose and the substantive policies of enforcement . . . " Wilson, supra, at 271.

This lack of uniformity among § 1983 statutes of limitation in the various states is, in fact, directly contemplated by § 1988. This Court stated, in Board of Regents v. Tomanio, 446 U.S. 478, 489, (1980); citing Johnson v. Railway Express Agency Inc., 421 U.S. 454 (1975):

> The need for uniformity, while paramount under some federal statutory schemes, has not been held to warrant the displacement of state statutes of limitations for civil rights actions.

See, also Robertson v. Wegmann, 326 U.S.

584, 594 n. 11 (1978):

> Whatever the value of nationwide uniformity in areas of civil right enforcement where Congress has not spoken, in the areas to which § 1988 is applicable Congress has provided direction, indicating that state law will often provide the content of the federal remedial rule. This statutory reliance on state law obviously means that there will not be nationwide uniformity on these issues. (Emphasis supplied).

Thus, lack of nationwide uniformity cannot be the basis for invocation of this Court's jurisdiction.

Furthermore, the alleged conflict between the circuits cited by petitioner in no way implicates the real policy consideration underlying Wilson v. Garcia.

The concerns voiced by this Court in Wilson dealt with the fact that

different statutes of limitation were being applied, within the same state, on a case by case basis:

> If the choice of the statute of limitations were to depend upon the particular facts or the precise legal theory of each claim, counsel could almost always argue, with considerable force, that two or more periods of limitations should apply to each § 1983 claim. Moreover, under such an approach different statutes of limitations would be applied to the various § 1983 claims arising in the same state and multiple periods of limitations would often apply to the same case. Wilson, supra, at 273-74. (Emphasis supplied).

The opinion below, reaffirming the Mulligan holding that Ohio Revised Code § 2305.11, applies in all Ohio § 1983 actions, follows the policy of the Wilson decision that choosing the appropriate statute be "an uncomplicated task". Id.at 275. That other circuit courts of appeals, after reviewing entirely different state statutory schemes, have selected other statutes of limitations in no way violates the teachings of Wilson or necessitates further review by this Court.

II. PETITIONER'S CAUSE OF ACTION ALLEGING MALICIOUS PROSECUTION AN UNCONSTITUTIONAL CONVICTION ACCRUED NO LATER THAN THE DATE O THIS COURT'S DENIAL OF THE STATE'S PETITION FOR WRIT OF CERTIORAR FOLLOWING APPEAL FROM A FINA JUDGMENT GRANTING A WRIT OF HABEA CORPUS.

This Court reaffirmed in Wilson v. Garcia that the "length of the limitation period and closely related questions of tolling and application are to be governed by State law." 461 U.S. at 269 (Emphasis supplied). See also Johnson v. Railway Express Agency Inc., 421 U.S. 454, 462 (1975) Jones concedes that his cause of action is in the nature of a malicious prosecution claim; his federal claim is that he was unconstitutionally convicted.

The law in Ohio governing when the cause of action for malicious prosecution accrues is clear. In Levering v. National Bank of Morrow County, 87 Ohio St. 117 (1912), the Ohio Supreme Court held that the right to sue for malicious prosecution:

> . . . accrues upon the rendition in the trial court of a judgment for the defendant in the action complained of, and is barred by the statute of limitations if not brought within one year after such judgment, although a proceeding in error may have intervened. Syl. Para. 2 (Emphasis provided).

Levering is still the law in Ohio. See Board of Education, Miami Trace Local School District v. Marting. 36 Ohio Ops. 2d 134, 7 Ohio Misc. 64 (C.P. Madison

1966); Baxter Travenol Laboratories v. LeMay, 536 F. Supp. 247, 248-49 (S.D. Ohio 1982).

It is axiomatic, under the rule of Levering, that when a plaintiff is convicted, and thereafter collaterally attacks that conviction, the cause of action accrues when plaintiff obtains a final judgment overturning the conviction. Thus, in the instant action, the cause of action accrued when Judge Battisti invalidated Jones' state court conviction in February of 1977. Indeed, the Sixth Circuit has characterized Levering as meaning that "the action [must be] commenced within one year following journalization of the judgment in favor of the party bringing action" Coffy v.

Multi-County Narcotics Bureau, 600 F. 2d 570, 581 n. 12 (6th Cir. 1979) (Emphasis supplied).

Jones obtained a final judgment overturning his state conviction on February 10, 1977, well over two and one-half years prior to his filing the instant lawsuit. Jones v. Jago, 428 F. Supp. 405 (N.D. Ohio 1977); See also, Jago v. U.S. District Court, 570 F. 2d 618, 619, (6th Cir. 1978).

Plaintiff's cause of action accrued on February 10, 1977, the date that the District Court granted Jones' petition for writ of habeas corpus. See Jones v. Jago, supra. The Sixth Circuit characterized Judge Battisti's self-executing order as

follows:

> "[Jones] is possessed of final judgment that his trial did not meet constitutional standards of fairness and is by now entitled to release on bail . . . Jago v. U. S. District Court, supra, 570 F. 2d 618, 619. (Emphasis supplied).

The latest date that plaintiff's cause of action arguably could have accrued was when the Supreme Court denied certiorari on October 2, 1978 or on October 16, 1978, when Justice Stewart denied the State's motion to suspend the denial of certiorari. As stated by the District Court below:

> The Supreme Court denied certiorari on October 2, 1978. That Order was

> affirmed by Justice Stewart's refusal to suspend the denial of certiorari on October 16, 1978. The denial of certiorari represented the highest rung on the ladder of appellate review. The state's case was effectively laid to rest when certiorari was denied. (Respondent's Appendix A53-54).

Plaintiff argues that his cause of action did not accrue until October 27, 1978 when the Cuyahoga County Common Pleas Court nolled the changes contained in plaintiff's original indictment or, until February 12, 1979, when Judge Battisti unconditionally released Jones and removed all bail restrictions. These arguments are simply untenable.

Whether or not the State chose to re-try Jones had absolutely nothing to do with his cause of action alleging that his 1972 conviction was unconstitutional. The District Court characterized Jones' claims, in his complaint, as follows:

> ". . . the defendants, acting both individually and in concert, intentionally supressed evidence which was favorable to his case, allowed perjured testimony to be presented at his trial . . . it was only through these activities that his conviction was obtained. (Petitioner's Appendix A40-41).

A decision by the State to re-try Jones rather than nolle the charges would not have implicated the claims alleged in Jones' complaint. The district court set aside Jones' 1972 conviction in Jones v. Jago, 428 F. Supp. 405 (N.D. Ohio 1977). Under Levering, this was certainly a "judgment for the defendant" at which time Jones' cause of action accrued under Ohio and federal law.

III. PETITIONER IS NOT ENTITLED TO A FEDERAL EQUITABLE RULE TOLLING OPERATION OF THE OHIO STATUTE OF LIMITATIONS DURING THE PERIOD HE WAS RELEASED FROM CONFINEMENT BUT UNDER THE RESTRICTION OF BAIL.

Petitioner has wisely abandoned the argument, raised throughout the proceedings below, that the disability of "imprisonment" found in Ohio Revised Code § 2305.16 tolled the statute of limitation during the period that Jones was free on bail. Instead, Petitioner now urges the Supreme Court to forge a federal equitable exception to state tolling statutes, during such times as § 1983 plaintiffs are released from incarceration under the restriction of bail.

Jones' is entitled to equitable tolling of the Ohio Statute only if the

state rule of law is "inconsistent with the Constitution and laws of the United States" Board of Regents v. Tomanio, 446 U.S. 478, 485 (1980). Jones has fallen far short of demonstrating such an inconsistency.

This is not a case like Younger v. Harris, 401 U.S. U.S. 37 (1971) where a court is asked, in a § 1983 action, to enjoin an ongoing state criminal proceeding. Neither is this a situation like Preiser v. Rodriquez, 411 U.S. 475 (1973) where the § 1983 plaintiff seeks injunctive relief from incarceration prior to exhaustion of the habeus corpus proceedings.

And, finally, this case does not present the question, left unresolved in

Tower v. Glover 467 U.S. 914, 923 (1984) of whether,

> ". . . a Federal District Court should abstain from deciding a § 1983 suit for damages pending the collateral exhaustion of state-court attacks on the conviction itself."

Indeed, none of the cases cited by Jones are remotely on point. Jones successfully exhausted his habeus corpus remedy more than one year prior to filing the instant lawsuit. There was absolutely no federal policy in favor of defering consideration of Jones' complaint after this Court denied certiorari on October 2, 1978 and Jones' success in the habeus proceeding was complete.

This Court stated, in Robertson v.

Wegmann, 436 U.S. 584, 593 (1978), that:

> A state statute cannot be considered "inconsistent" with federal law merely because the statute causes the plaintiff to lose the litigation. If success of the § 1983 action were the only benchmark, there would be no reason at all to look to state law, for the appropriate rule would then always be the one favoring the plaintiff, and its source would be essentially irrelevant.

Jones can point to no overriding federal policy supporting a federal equitable tolling rule, other than the fact that state law caused him to lose this lawsuit. Under the clear precedent of this Court, Jones' action was properly dismissed.

CONCLUSION

It is respectfully submitted that petitioner filed this lawsuit outside of the one year limitation period that, at all times, was in effect. No genuine issues are implicated by this appeal justifying review by the Supreme Court of the United States. For all of the foregoing reasons, Respondents Shankland and Fuerst urge this Court to deny the petition for writ of certiorari.

Respectfully submitted,

MARILYN G. ZACK
Director of Law

ROBERT M. WOLFF
Counsel of Record
For Respondents
Shankland and Fuerst.

City of Cleveland
Room 106 - City Hall
601 Lakeside Avenue
Cleveland, Ohio 44114
(216) 664-2673